Supreme Court, U.S.
FILED
MAR 16 2000
CLERK

No. 99-478

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

March 16, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ALTHOUGH THE LAW RECOGNIZES MOTIVE AND INTENT AS DISTINCT CONCEPTS, THE "PURPOSE TO INTIMIDATE" ELEMENT OF N.J. STAT. ANN. § 2C:44-3e. TRANSGRESSES BOTH CONCEPTS..... 1

II. THE DEATH PENALTY CASES CITED BY RESPONDENT AND *AMICUS CURIAE* ARE READILY DISTINGUISHABLE FROM THE CASE *SUB JUDICE* 3

III. A COMPARISON WITH THE FEDERAL SENTENCING GUIDELINES HIGHLIGHTS THE FLAWED APPROACH OF N.J. STAT. ANN. § 2C:44-3e 4

IV. A REVIEW OF THE RELEVANT SUPREME COURT CASES SUPPORTS THE PROPOSITION THAT N.J. STAT. ANN. § 2C:44-3e VIOLATES THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS 6

V. N.J. STAT. ANN. § 2C:44-3e VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION BY DENYING CRIMINAL DEFENDANTS NOTICE BY INDICTMENT OF GRAND JURY..... 13

VI. N.J. STAT. ANN. § 2C:44-3e SUBJECTS CRIMINAL DEFENDANTS TO A SUBSTANTIAL INCREASE IN THE MAXIMUM SENTENCE... 16

VII. THE RULE PROPOSED BY THE UNITED STATES WOULD STRIP CRIMINAL DEFENDANTS OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 12

Barclay v. *Florida*, 463 U.S. 939 (1983) 4

Jones v. *Pennsylvania*, 119 S. Ct. 1215 (1999)... 9, 12, 13, 16

McMillan v. *United States*, 477 U.S. 79 (1986) 9, 10, 11, 12

Mullaney v. *Wilbur*, 421 U.S. 684 (1975)..... 6, 7, 8

Patterson v. *New York*, 432 U.S. 197 (1977) 8, 9

Screws v. *United States*, 325 U.S. 91 (1945) 1

Spaziano v. *Florida*, 468 U.S. 447 (1984) 4

United States v. *Calandra*, 414 U.S. 338 (1974) 15

Williams v. *New York*, 337 U.S. 241 (1949).....3, 4

In re Winship, 397 U.S. 358 (1970) 6, 10, 19

Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 1, 5

Federal Statute

28 U.S.C.A. § 994, Historical and Statutory Notes 5

State Statutes

N.J. Stat. Ann. § 2C:39-3a..... 16

§ 2C:43-6a(2) 16, 17

§ 2C:44-1..... 17

§ 2C:44-3e..... *passim*

TABLE OF AUTHORITIES – Continued

Page

State Court Rule

N.J. Ct. R. 3:21-4(e)..... 14

Scholarly Authority

Lucien B. Campbell and Henry J. Bemporad, *An Introduction to Federal Guideline Sentencing*, 10 Fed. Sent. R. 323 (1998)..... 5

Other Authority

U.S. Sentencing Guidelines Manual (1998)..... 5

REPLY BRIEF OF PETITIONER

I. ALTHOUGH THE LAW RECOGNIZES MOTIVE AND INTENT AS DISTINCT CONCEPTS, THE "PURPOSE TO INTIMIDATE" ELEMENT OF N.J. STAT. ANN. § 2C:44-3e. TRANSGRESSES BOTH CONCEPTS.

Respondent attempts to draw a meaningful distinction between motive and intent in order to dismiss the "purpose to intimidate" element of N.J. Stat. Ann. § 2C:44-3e. as a mere "motive" factor that can be relegated to the sentencing phase. But the Respondent paints with too broad a brush, suggesting a clear distinction where there is none. Although the law recognizes motive and intent as distinct concepts, the "purpose to intimidate" element of N.J. Stat. Ann. § 2C:44-3e. cannot be so easily classified. Contrary to Respondent's unsupported declaration, "motive" is by no means exclusively a sentencing factor. See, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("[T]he offense of treason . . . may depend very much on proof of motive.") (citing *Haupt* v. *United States*, 330 U.S. 631 (1947)); *Screws* v. *United States*, 325 U.S. 91, 101 (1945) ("An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. And that issue must be submitted to the jury under appropriate instructions.") (citations omitted) (plurality opinion).[1]

---

[1] The *Screws* case is instructive here because it involved a federal statute, 18 U.S.C. § 52, that prohibited individuals acting under color of law from "willfully" depriving a person of his or her rights on account of that person's "color, or race." 325 U.S. 91, 93 (1945). Although the statute used "willful" rather than the "purpose[ful]" language of N.J. Stat. Ann. § 2C:44-3e., the Court recognized that the statute created a specific intent (or heightened *mens rea*) crime; consequently, the Constitution required that "the essential ingredients of the only offense on which the conviction could rest" be submitted to the jury. *Id.* at 107.

Respondent attempts to draw a distinction between motive and intent in the following fashion: " 'Motive is the moving course, the impulse, the desire that induces the defendant to criminal action. It is distinguished from intent, which is the *purpose* to use a particular means to effect a certain result.' " Resp. Br. 31 (emphasis added) (quoting *Allen* v. *City of Los Angeles*, 92 F.3d 842, 850 (9th Cir. 1996)). This only proves Petitioner's point, as N.J. Stat. Ann. § 2C:44-3e. specifically employs the term "purpose," rather than "motive." See *id.* (using the words "purpose to intimidate"). The definition of "intent" proposed in the brief by *Amici Curiae* Brudnick Center on Violence and Conflict et al., also supports Petitioner's contention that N.J. Stat. Ann. § 2C:44-3e. defines an essential element of the substantive offense: "In its simplest definition criminal intent refers to the *mens reas* or the level of awareness or purposefulness one has in relation to the criminal act or *actus reus*." *Id.* at 5-6. Again, at page 6 n.2, these *Amici* explain, " '[s]pecifically, intent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of an offense.' " *Id.* (quoting Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law* 108 (1999)). The "purpose to intimidate" element in N.J. Stat. Ann. § 2C:44-3e. "concerns the mental state . . . for assessing the actor's culpability" despite the State's efforts to treat it as something less than an element of the offense. Thus, even the authorities cited to support N.J. Stat. Ann. § 2C:44-3e. suggest that *mens rea*, intent or purpose are functionally identical.

The "purpose to intimidate" language of N.J. Stat. Ann. § 2C:44-3e. describes something more than "motive" in its narrowest sense. It is a purpose to effect a certain result – intimidation. Respondent cannot escape the requirements of due process by merely labeling a specific intent or heightened *mens rea* element as a "motive." It is the fundamental character of the element, not its label, that triggers the protections afforded by the Constitution. New Jersey has every right to criminalize acts of violence

committed because of a purpose or motive to discriminate on the basis of race, but it cannot, without violating bedrock constitutional principles, treat the hate element of a hate crime statute as a mere sentencing factor subject to a judicial determination by a mere preponderance of the evidence.

Respondent merely begs the question presented by repeatedly claiming that "evidence of racial animus as the motivation for the substantive offense is a relevant sentencing factor." See Resp. Br. 35. If N.J. Stat. Ann. § 2C:44-3e. merely instructed the judge to consider evidence of bias in determining the appropriate sentence for the underlying crime, the statute would not implicate constitutional concerns. This case, however, presents a fundamentally different question – the doubling of a statutory maximum sentence based on a preponderance determination of a heightened *mens rea* element. Respondent's Brief never comes to grips with that fundamental distinction.

II. THE DEATH PENALTY CASES CITED BY RESPONDENT AND *AMICUS CURIAE* ARE READILY DISTINGUISHABLE FROM THE CASE *SUB JUDICE*.

Respondent notes that courts have considered racial bias as a factor in determining an appropriate sentence in capital murder cases, but to say that racial bias *may* be considered at sentencing does not speak to the constitutional limits on state authority to redefine substantive elements as mere sentencing factors. The death penalty cases cited by Respondent and by *Amicus* United States do not support the constitutionality of N.J. Stat. Ann. § 2C:44-3e. For example, *Williams* v. *New York*, 337 U.S. 241 (1949), cited repeatedly by the Respondent, recognized that the task of a sentencing judge is to determine the appropriate punishment *"within fixed statutory or constitutional limits."* *Id.* at 247 (emphasis added). In *Williams*, the defendant was convicted after a jury trial of first-

degree murder, an offense automatically punishable by death unless the jury recommended life imprisonment, in which case the judge had discretion to accept the jury's recommendation or to impose a death sentence. *Id.* at 242. *Barclay* v. *Florida*, 463 U.S. 939, 944 (1983), and *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984) involved a similar statute. In each case, the jury – not the judge – made the initial determination, based on proof beyond reasonable doubt, that the defendant was *punishable* by death, even if they ultimately recommended that the defendant receive life imprisonment. By concluding that the defendant had committed first degree murder, the jury in each case effectively set the maximum penalty at death, leaving to the judge at sentencing the ultimate authority to choose between the sentences authorized by statute.

In contrast, N.J. Stat. Ann. § 2C:44-3e. permits a sentencing judge to impose a sentence far in excess of the statutory limit for the underlying offense. A truly analogous death penalty statute would provide for life imprisonment for first degree murder (thus setting the statutory maximum for the offense at life imprisonment) and a separate "penalty enhancing provision" calling for the imposition of a death sentence if the trial judge made certain determinations of the defendant's mental state based on a mere preponderance of the evidence. There is no doubt that such a statute would violate the Fifth and Sixth Amendment rights of criminal defendants; similarly, there should be no doubt here that N.J. Stat. Ann. § 2C:44-3e. violates those same constitutional protections.

III. A COMPARISON WITH THE FEDERAL SENTENCING GUIDELINES HIGHLIGHTS THE FLAWED APPROACH OF N.J. STAT. ANN. § 2C:44-3e.

N.J. Stat. Ann. § 2C:44-3e. simply does not create a garden-variety sentencing factor. Unlike traditional sentencing factors, the "purpose to intimidate" element of the New Jersey statute heightens the statutory maximum

punishment and does so, not based on some objectively verifiable determination (such as a prior conviction), but based on a preponderance determination of a criminal defendant's mental state. A comparison with the federal sentencing guidelines demonstrates the serious constitutional defects in New Jersey's approach. The federal statute permits an increase in the base offense level only if the *finder of fact* determines *beyond a reasonable doubt* that the crime was a hate crime. See 28 U.S.C.A. § 994, Historical and Statutory Notes.[2] Furthermore, under the guidelines, "the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . . is not greater than the statutorily authorized maximum sentence. . . . " *U.S. Sentencing Guidelines Manual* § 5G1.1 (1998). Thus, the aggravating or mitigating factors in the guidelines serve only to increase or decrease a sentence *within* the maximum sentence provided by the statute. See Lucien B. Campbell and Henry J. Bemporad, *An Introduction to Federal Guideline Sentencing*, 10 Fed. Sent. R. 323, 323-24 (1998) ("Under guideline sentencing, the court's discretion to fix sentence is cabined within a guideline range that may be a small fraction of the statutory limit. . . . The guideline sentencing range does not supplant minimum and maximum sentences prescribed by statute.").

---

[2] As indicated, Pet. Br. 25 n.10, the vast majority of states have recognized the constitutional implications of the determination of a defendant's biased purpose in committing a crime and have adopted similar procedural safeguards. *See, e.g., Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) (observing that the Wisconsin statute at issue in that case, Wis. Stat. § 939-645, required the jury to find race-based motive for the sentence enhancing provisions to go into effect).

IV. A REVIEW OF THE RELEVANT SUPREME COURT CASES SUPPORTS THE PROPOSITION THAT N.J. STAT. ANN. § 2C:44-3e. VIOLATES THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS.

The bedrock ruling of *In re Winship*, 397 U.S. 358 (1970), was that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Respondent's brief selectively recites the Court's precedents and fails to successfully distinguish the one case most directly on point, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *Mullaney* strongly supports the proposition that N.J. Stat. Ann. § 2C:44-3e. violates the constitutional rights of criminal defendants. For the reason stated here, *Mullaney* addressed the question of what procedural protections apply where a "heightened mens rea," motive or purpose question arises. In *Mullaney*, the Court considered a Maine statute that "conclusively implied" that all homicides were committed with malice, unless the defendant was able to rebut this presumption. The defendant presented no evidence in the case, but argued that he had acted without intent and, in the alternative, that he had acted in the heat of passion. *Id.* at 685. Central to the Court's ruling was the fact that the structure of the State's homicide law distinguished between those who had acted with malice and those who had acted for a less blameworthy or less culpable reason. While having acted volitionally, persons who acted without malice were guilty of "voluntary" or even "involuntary" manslaughter. *Id.* at 691-96.

In its holding, the Court invalidated the State's application of its "presumed malice" rule, declaring that "[b]y drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*." *Id.* at 698. Accordingly, *Mullaney* required that the State prove beyond a reasonable

doubt the charge that the defendant had acted with a heightened standard of intent – that is, maliciously – and was thereby subject to a substantially increased maximum punishment.

The Court's constitutional holding in *Mullaney* cannot be confined solely to a declaration that Maine could not constitutionally shift the burden of proof of having acted *without* malice to the defendant. If that in fact had been the holding, then the opinion would have left unanswered the question of what level of burden the State shouldered in proving its claim that the defendant had acted not only voluntarily, but also maliciously. As noted above, however, the Court's opinion does not leave that question unanswered. It states quite plainly that State must demonstrate its allegation of malice beyond a reasonable doubt. *Id.* at 698. The constitutional principle thereby fashioned in *Mullaney* was not only that the State was prohibited from shifting the burden of proof of a heightened *mens rea* charge to the defendant, but also that the State *retained* the burden of proving its charge beyond a reasonable doubt. Moreover, as in *Winship*, the Court emphasized that the application of this constitutional principle defied formalistic attempts to diminish the operation and effect of the law. *Id.* at 699 ("*Winship* is concerned with substance rather than this kind of formalism.").

Here, as in *Mullaney*, the State of New Jersey has created a statutory scheme which distinguishes culpability based upon the *mens rea* with which the defendant committed the charged acts. Under N.J. Stat. Ann. § 2C:44-3e., petitioner was subjected to a sentence twice what he would otherwise have received. This was based solely upon a charge that his intent, his purpose, was more culpable, and more malicious, than that of merely possessing a weapon with some undefined but nevertheless unlawful purpose. The State's placement of such a distinction within a sentence enhancement statute constitutes precisely the type of formalism decried in *Winship*

and *Mullaney*.[3] Even assuming that the State may engage in the formalistic, but legislatively convenient, expedient of grouping enumerated crimes in which this distinction between generalized intent and more culpable forms of intent makes a difference, the Court cannot ignore the " 'operation and effect of the law as applied and enforced by the State.' " *Id.* at 699 (quoting *St. Louis S.W. Ry. Co.* v. *Arkansas*, 235 U.S. 350, 362 (1914)).

The Court's holding two Terms later in *Patterson* v. *New York*, 432 U.S. 197 (1977), did not alter the fundamental holding in *Mullaney*. At issue in *Patterson* was only whether the burden of proving an affirmative defense (in that case extreme emotional disturbance), could constitutionally rest with the defendant. As noted by the Court in both *Mullaney* and *Patterson*, the practice in many states was that the prosecution must, beyond a reasonable doubt, affirmatively disprove the presence of an affirmative defense. *Mullaney*, 421 U.S. at 702 & n.30; *Patterson*, 432 U.S. at 211. In *Patterson* the Court "decline[d] to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 432 U.S. at 210. This case, however, like *Mullaney*, does not address the presence or absence of an affirmative defense. Instead, it concerns the State's affirmative *charge* that petitioner acted not only with a "general" unlawful intent but with a specific racial bias.

---

[3] Indeed, the *Mullaney* Court anticipated, with disapproval, the very type of statutory scheme New Jersey has imposed here. The Court noted that many states differentiate among levels of *mens rea* with respect to assault crimes. 421 U.S. 684, 699 n.24 (1975). It observed that "[i]f *Winship* were limited to a State's definition of the elements of a crime, these states could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation – *e.g.*, intent to kill or intent to rob." *Id.*

The *Patterson* Court also acknowledged the overarching principle that a state may not, in formalistic fashion, define away the fundamental aspects of its charge and thereby "reallocate burdens of proof." *Id.* "[T]here are obviously constitutional limits beyond which the States may not go in this regard." *Id.* Here, those limits have been exceeded. New Jersey has removed to the sentencing stage the most fundamental aspect of the "hate crimes" it charges; namely, that the defendant was motivated by some specific form of hatred – targeted toward a specific, identified group – rather than a general unlawful intent, and that he acted with the further purpose to intimidate that group. In its operation and effect, the state's scheme relieves the State's burden to prove beyond a reasonable doubt what is certainly a traditional "element" of crime – the defendant's mental state.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court found constitutional a Pennsylvania provision which accorded discretion to the sentencing court to impose, after a finding based upon a preponderance of the evidence, a mandatory minimum incarceration period upon a defendant who had "visibly possessed a firearm" during the course of the underlying offense for which the jury had found the defendant guilty. *Id.* at 84-91. As noted in the Court's decision last Term in *Jones* v. *United States*, the *McMillan* Court explicitly based its holding on the fact that the Pennsylvania provision in dispute only resulted in mandatory minimum sentences that were within the maximum range of punishment. 119 S. Ct. 1215, 1223 (1999). "[I]t did observe that the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact." *Id.* at 1223 (citing *McMillan*, 477 U.S. at 88 (observing that the Pennsylvania scheme "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm")).

Importantly, the *McMillan* Court did not diminish the constitutional principles established in *Winship*, *Patterson*, and *Mullaney*. "As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard [defining crimes and prescribing penalties]; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." 477 U.S. at 86. Indeed, the *McMillan* Court cited and distinguished *Mullaney* as one such instance precisely because Maine's implied malice statute subjected the defendant to a greatly increased maximum penalty. *Id.* at 87. Nor did the Court in *McMillan* construe the constitutional principles at work to limit solely the States' authority to reallocate burdens of proof, explaining that due process may forbid "*reduction* of burdens of proof in criminal cases" as well as reallocations. *Id.* at 86 (emphasis added).[4]

The *McMillan* Court also approved of Pennsylvania's statute on the ground that its "visible possession of a firearm" sentencing provision did not create a presumption of guilt or strip away the presumption of innocence. To be sure, no facts were presumed under the Pennsylvania statute in *McMillan* nor are they presumed under N.J. Stat. Ann. § 2C:44-3e. Petitioner in *McMillan*, however, failed to identify an important effect of removing crucial fact findings to the sentencing courts and reducing the burden of proof to a mere preponderance standard. Sentencing courts do not treat the presumption of innocence as applicable to sentencing proceedings. The presumption of innocence is an instruction given only to juries. The state statutory schemes that remove findings of fact to

---

[4] Contrary to the assertion made by Respondent, Resp. Br. 10, *McMillan* did not establish a cut-and-dried constitutional "test" to define the parameters of permissible state authority to define crimes and prescribe penalties. Rather, the *McMillan* Court identified a number of factors which formed its decision in that particular case.

sentencing therefore do operate to discard the presumption of innocence, even if they do not do so expressly.

Under the reasonable doubt standard, criminal sanctions cannot be imposed unless the state and the state alone provides sufficient evidence to prove a fact beyond a reasonable doubt. Although a defendant *may* present evidence to rebut the state's evidence, he or she is not required to do so. The standard considers whether the state's evidence is sufficient, and although evidence presented by the defendant affects the calculus, it is not an essential component of it (*i.e.*, a defendant is still protected by the standard even if he or she presents no evidence.). By contrast, a preponderance standard requires the finder of fact to weigh competing evidence. If the state presents *any* evidence, the defendant must rebut that evidence or else the state will be held to have met its burden. Thus, the preponderance standard *increases* the defendant's burden to prove that he is innocent and correspondingly *decreases* the state's burden to prove guilt. Cf. *McMillan*, 477 U.S. at 87 ("Nor does [the Act] relieve the prosecution of its burden of proving guilt."). Put simply, under a preponderance standard, the presumption of innocence can mean only that at the outset the scales of justice are even.

The sentencing proceedings in this case amply demonstrate how the application of a preponderance standard strips away the presumption of innocence and fundamentally alters the parties' relative positions in a criminal case. Prior to sentencing, Petitioner offered extensive character evidence, his own testimony, and the testimony of an expert witness. The prosecution, on the other hand, simply offered evidence to negate that offered by Petitioner, the testimony of the interrogating officer to negate Petitioner's claims of coercion and the testimony of Mr. Fowlkes to negate Petitioner's claims that in his altered mental state the door alone triggered a destructive impulse. Judge Ridgway's discussion suggests that Petitioner's admission in his plea that he had fired at the house on two occasions "to scare someone"

was alone sufficient to tip the scales in favor of a finding that Petitioner had the requisite mental state to impose an enhanced sentence. Pet. App. 143a-144a.

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), this Court indicated that an increase in the maximum sentence *alone* will not suffice to render a sentencing factor a *de facto* element that must be submitted to a jury and proved beyond a reasonable doubt. See *id.* at 243-45. But N.J. Stat. Ann. § 2C:44-3e. does far more than the sentencing factor at issue in *Almendarez-Torres*. *Almendarez-Torres* addressed recidivism: a sentencing factor that, although it alters the maximum penalty for the crime committed, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. Like the sentencing factor at issue in *McMillan*, recidivism is a "simple, straightforward issue susceptible of objective proof." 477 U.S. at 84.[5] By contrast, the "purpose to intimidate" in N.J. Stat. Ann. § 2C:44-3e. is not a traditional sentencing factor, nor does it present a "simple, straightforward issue susceptible of objective proof." *Id.*

Most recently, in *Jones*, 119 S. Ct. at 1221, the Court interpreted various subsections in the federal carjacking statute, 18 U.S.C. § 2119, to create aggravated forms of the crime rather than mere sentence-enhancing factors. 119 S. Ct. at 1221. In the course of its analysis, the Court suggested the following constitutional standard for determining whether a statute creates a substantive element of an offense or merely a sentencing factor: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment,

---

[5] As the Court recognized subsequently in *Jones*, recidivism is unique in that "unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before [the Court in *Jones*], a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 119 S. Ct. 1215, 1227 (1999).

submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 1224 n.6.[6]

Like the "serious bodily injury" element in *Jones*, N.J. Stat. Ann. § 2C:44-3e. increases the maximum penalty for a crime based on a judge's determination of a crucial fact under a preponderance of the evidence standard. Furthermore, N.J. Stat. Ann. § 2C:44-3e. "not only provide[s] for steeply higher penalties, but condition[s] them on further facts (injury, death) that seem quite as important as the elements in the [principal offense]." *Id.* at 1218. Indeed, the "hate" element of a hate crime is as important, if not more important, than the elements of the underlying offense, and a judicial finding of that element carries roughly the same criminal sanction (*i.e.*, it effectively doubles the penalty for first, second, and third degree crimes).

V. N.J. STAT. ANN. § 2C:44-3e. VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION BY DENYING CRIMINAL DEFENDANTS NOTICE BY INDICTMENT OF GRAND JURY.

The State's interpretation of N.J. Stat. Ann. § 2C:44-3e. would allow the prosecution to avoid mentioning the possible enhancement to the grand jury and to ignore it in an indictment. The defense first received notice on May 3, 1995 that the prosecution would seek an extended prison term. New Jersey Rules of Court 3:21-4(e) states that "[a] motion pursuant to N.J. Stat. Ann. § 2C:44-3 . . . for the imposition of an extended term

---

[6] The Court did not attempt to establish a definitive constitutional rule, rather, it articulated the standard to clarify its constitutional concerns and to support its application of the doctrine of constitutional doubt. *Jones*, 119 S. Ct. at 1223 & n.6. Nevertheless, it reflects the Court's most recent pronouncement on the issues squarely presented by this appeal and reiterates the Court's commitment to the principles established in *Winship*.

of imprisonment . . . shall be filed with the court by the prosecutor within 14 days of the entry of defendant's guilty plea or of the return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea." N.J. Ct. R. 3:21-4(e). The prosecutor handed the defendant and defense counsel a motion for an extended term of imprisonment on the date the plea of guilty was entered, July 24, 1995. The plenary hearing on the issue of extended imprisonment was held September 5, 1995.

Had the Petitioner been given notice in the indictment of the racial animus charge, he would have had greater opportunity to consider the overall circumstances involving the strategy of trial and of any bargain proposed by the State. Any interview and research which the defendant might have conducted during this period might well have significantly been redirected and included much more direct concern with the defendant's alleged racist motives. This "sentence by ambush" technique clearly violates any notion of fair notice and due process. Nothing in the statute – and certainly no concession in the State's brief – would require notice prior to the day of conviction.

Accordingly, N.J. Stat. Ann. § 2C:44-3e. was drafted by the New Jersey Legislature to allow a prosecuting attorney to make an application for an extended term of imprisonment *after* a person "has been convicted of a crime." See Pet. Br. 2. This is significant for two reasons. First, in violation of the Fifth Amendment of the United States Constitution, this procedure of waiting until after a conviction before making the hate crime application effectively denies a defendant his fundamental right to have the racial animus charge reviewed by an independent Grand Jury. Secondly, it denies both the defendant and his defense counsel *reasonable* notice to properly contemplate the efficacy of the plea bargain before it was entered into by the defendant.

Indictment by a Grand Jury affords defendants the fundamental constitutional protection of having an independent body comprised of members of the community at large review the pending charges against him or her, which is separate from the government or the prosecution. See *United States* v. *Calandra*, 414 U.S. 338, 342-46 (1974).

The institution of the Grand Jury is a protector of citizens against arbitrary and oppressive governmental action. Notice by indictment also affords trial counsel the ability to adequately prepare and to counsel a defendant on the quality of the plea bargain against the backdrop of the extended term application. In its defense of N.J. Stat. Ann. § 2C:44-3e., the State can only claim that Petitioner and his counsel had *some* actual notice of the State's intention to seek an extended term prior to the entry of his guilty plea. Resp. Br. 39.[7] But again N.J. Stat. Ann. § 2C:44-3e. does not require such notice and the larger question before the Court remains whether such notice is a required procedural protection.

On this record, no appropriate notice was required and none was given in a timely fashion. Clearly a notice *by indictment* of a hate crime violation would have given defense counsel a more reasonable time to contemplate the parameters of the guilty plea and guide the defendant on the value of the plea bargain. See JA 2 (indicating that the indictment occurred on January 19, 1995, some seven months before the entry of the plea). Had the defendant been given notice of the racial animus charge by indictment, he would have had ample opportunity to consider the overall circumstances involving the strategy of the plea bargain and exposure to a potentially doubled prison sentence.

Given the procedural deficiencies of this statute, it is entirely probable that other defendants exposed to the hate crime law in the State of New Jersey will not be

---

[7] *See* JA 21, 41, 43; Pet. App. 166a.

given prior notice of an application for an extended term of imprisonment until after conviction. That would make the scenario akin to the factual scenario in *Jones* v. *United States*, 119 S. Ct. 1215 (1999), wherein the defendant became aware that he was exposed to an extended term of imprisonment of 25 years at the time of a pre-sentence investigation report, indicating that because one of the victims had suffered a serious "bodily injury", he would be exposed to an additional 10-year prison term. *Id.* Previously, the defendant had been told at his arraignment by a magistrate judge that he had faced a maximum charge of 15 years on the carjacking violation. *Id.* at 1218. Under N.J. Stat. Ann. § 2C:44-3e., a defendant can enter into a plea bargain having absolutely no idea that his guilty plea will subsequently trigger an application from the prosecuting attorney for an extended term of imprisonment for up to twice the maximum sentence that would have been imposed. In such circumstances, defense counsel is not reasonably able to advise a defendant on the appropriateness of a guilty plea. For this reason alone, the hate crime law must be declared unconstitutional.

VI. N.J. STAT. ANN. § 2C:44-3e. SUBJECTS CRIMINAL DEFENDANTS TO A SUBSTANTIAL INCREASE IN THE MAXIMUM SENTENCE.

The *amicus* brief of the Anti-Defamation League ("ADL") misinterprets the sentencing scheme under N.J. Stat. Ann. § 2C:44-3e. Contrary to the suggestion of the ADL, see ADL Br. 10 n.7, 20, Judge Ridgway did not have the option to select between two alternative punishments for a second degree crime under N.J. Stat. Ann. § 2C:43-6a(2), one of which gave the court a five to ten year sentencing range and the other of which gave him a ten to twenty year sentencing range. Possession of a weapon for an unlawful purpose, the crime at issue here, is a second-degree offense. N.J. Stat. Ann. § 2C:39-3a. Under New Jersey law, a person convicted of a second-

degree crime must be sentenced "for a specific term of years which shall be fixed by the court and shall be between five years and ten years." N.J. Stat. Ann. § 2C:43-6a(2). The New Jersey State Legislature has further articulated that there is a presumptive term of seven years for conviction of a first time offender (like Petitioner) for a second degree crime. See N.J. Stat. Ann. § 2C:44-1. Judge Ridgway concluded during the sentencing hearing that there were two aggravating factors and three mitigating factors.[8] JA 48. Because the sentencer found more mitigating factors than aggravating factors, Mr. Apprendi would probably have received a sentence of seven years. Thus, N.J. Stat. Ann. § 2C:44-3e. effectively raised his sentence from a presumptive term of seven years to twelve years, and raised the maximum sentence from a possibility of ten years to a possibility of twenty years. Mr. Apprendi ultimately received a twelve-year sentence, roughly double what he would have received had N.J. Stat. Ann. § 2C:44-3e. not been applied.

VII. THE RULE PROPOSED BY THE UNITED STATES WOULD STRIP CRIMINAL DEFENDANTS OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS.

The brief of the United States attacks the rule proposed in *Jones*, namely, that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a

---

[8] The mitigating factors were as follows: #6 (the defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained or will participate in a program of community service), #7 (the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense), and #8 (the defendant's conduct was the result of circumstances unlikely to recur). Pet. App. 159a-160a.

jury, and proven beyond a reasonable doubt.' " U.S. Br. 6 (quoting *Jones*, 526 U.S. at 243 n.6). But the rule proposed by the United States in response is truly remarkable. The United States argues that there is *no* limit on the legislature's authority to remove fact-finding authority from the jury and place it in hands of sentencing judges. The United States admits that "[r]eliance on statutory sentencing factors to enhance a range [even above the maximum] does make a particular sentence turn on nonjury determinations," *id.* at 27, but it argues that this is not functionally different from a specific charge which nonetheless may result in a vast range of judge-imposed sentences under a very high maximum. *Id.* In either scheme, the United States notes, a judge or jury's finding of guilt " 'open[s] the door' to a long prison sentence." *Id.* (alteration in original).

The constitutionally pernicious aspect of this argument is that, as in this case, the proposed rule affords the prosecutor and the sentencing court an opportunity to alter fundamentally the nature of the charged crime – even *after* a trial or plea. Here, for example, the defendant was charged with a relatively innocuous crime (possession of a firearm for an unlawful purpose) and sentenced as a perpetrator of a hate crime against a local African-American family – an egregious violation of the community's well-being. Similarly, under a hypothetical homicide statute that conforms to the rule proposed by the United States, a guilty plea to a charge of simple manslaughter (causing the death of another) could be ratcheted up to first degree murder based upon the sentencing court's findings with respect to the accused's mental state. The functional difference between the rule proposed by the *Jones* Court and that of the United States is the simple and efficient expedient that, when the prosecution is held to the burden of pleading and proving beyond a reasonable doubt facts which increase the statutory maximum, the defendant knows in advance what his least favorable outcome could be *regardless* of what the prosecution chooses to assert at sentencing. Due process

and fundamental fairness require that a person be adjudged guilty and imprisoned for a term of years only on the strength of evidence that amounts to more than that which would suffice in a civil case. *In re Winship*, 397 U.S. 358, 363 (1970).

The United States acknowledges the Court's concern with permitting legislative bodies such broad discretion that they are able " 'to manipulate [their] way out of *Winship*'," U.S. Br. 24 (quoting *Jones*, 526 U.S. at 243), by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." But that is precisely what its rule would do. It would allow the State to limit the jury's function and thereby to diminish the extent to which the jury interposes "between the State and the defendant, in order to protect against the conviction of innocent persons and to prevent arbitrary exercises of government power." *Id.* at 7. Moreover, a rule by which a state might convict an individual for one activity (possession of a weapon for an unlawful purpose) and sentence him for what might reasonably be perceived as a separate crime (a harmful act of hate against a minority group) does little to enhance the "respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364.[9] Nor does the United States adequately represent the interests of defendants in claiming that some defendants might benefit from the removal of potentially prejudicial issues from the purview of the jury. It is no secret and eminently reasonable that a defendant would prefer to have critical facts tried to a twelve-member jury, in a context where he bears no burden and is presumed

---

[9] While there may be limitations on *individual* sentences based upon due process principles prohibiting the use of misinformation or Eighth Amendment concerns with disproportionate sentences, U.S. Br. 28-29, these principles would have no limiting effect on a State's ability to define crimes in ways which leave defining and traditional elements to sentencing courts alone.

innocent. Even assuming that United States is correct that some defendants might prefer otherwise, such defendants can opt for bifurcation, stipulation, or special interrogatories. Accordingly, the rule proposed by the United States fails to satisfy both the constitutional and prudential principles at issue.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, Petitioner's twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged "with purpose to intimidate" on account of race.

Respectfully submitted,

JEFFREY T. GREEN
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

March 16, 2000